

BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

OREGON DEPARTMENT OF LAND)
CONSERVATION AND DEVELOPMENT,)
)
Petitioner,)
)
v.) LUBA No. 2006-233
)
JACKSON COUNTY,)
)
Respondent,)
)
)

OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT'S
PETITION FOR REVIEW

01-24-07

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4 CONSERVATION AND
5 DEVELOPMENT,

6 Petitioner,

7 v.

8 JACKSON COUNTY,

9 Respondent.

LUBA No. 2006-233

10
11 **OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT'S**
12 **PETITION FOR REVIEW**

13 **PETITIONER'S STANDING**

14 Petitioner, the Department of Land Conservation and Development (DLCD), has standing under
15 ORS 197.830(2). DLCD filed a notice of intent to appeal the challenged decision with the Land
16 Use Board of Appeals (LUBA), and appeared before Jackson County orally and in writing
17 during the proceedings leading to the challenged decision. Record 21, 246-248.

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STATEMENT OF THE CASE

A. Nature of the Land Use Decision and Relief Sought

The land use decision appealed by DLCD is Jackson County's Order of Approval 605-06, approving a four-lot subdivision of a 23.15-acre property. Record 1. The Jackson County Board of Commissioners signed Order 605-06 on November 28, 2006 (hereafter, the "Order"). Record 4. The Order provides that "[t]he subdivision request is a result of a Jackson County Board of Commissioners approved Measure 37 claim on property [that] is legally described as Township 38 South, Range 1 East, Section 35, Tax Lot 700." Record 1. The Order further provides that it is pursuant to Board Order 327-05, which is the county's order approving the Lee's Measure 37 claim. Record 1.

DLCD seeks reversal of Jackson County Order 605-06.

B. Summary of Argument

The Order is contrary to applicable provisions of state law that continue to apply to the proposed subdivision and residential use of the property. No order "waiving" applicable provisions of state law has been issued. Applicable state laws that prohibit the subdivision and the establishment of four dwellings on the property include: ORS 215.705, ORS 215.720, ORS 215.730, ORS 215.750, ORS 215.755 and ORS 215.780, Statewide Land Use Planning Goal 4, and OAR 660-006-0015, OAR 660-006-0025, OAR 660-006-0026, and OAR 660-006-0027.

C. Summary of Material Facts

This appeal concerns a 23.15-acre tract of land in Jackson County (tax lot 700, T38S R1E, section 35), near the City of Ashland. Record 5, 131. The tract is surrounded by lands in residential and agricultural uses, zoned EFU (Exclusive Farm Use) and OSR (Open Space Reserve). Record 5, 128, 138. The property is zoned OSR (Open Space Reserve) by Jackson

1 County. Record 28, 127. The OSR zone is a forest land zone under the Jackson County
2 Comprehensive Plan (JCCP). Record 135, 138. *See also* Exhibit A (describing OSR
3 designation).

4 On February 28, 2005, Willis and Lizbeth Lee filed a Measure 37 claim with Jackson
5 County. Record 131. The claim provided that the Lees desired to divide the property into four
6 parcels of a minimum of five acres each, and to build a new residence on the three new lots
7 created, and that county “land use regulations” restricted that use. Record 131, 138. Jackson
8 County determined, in Order 327-05, that the claim was valid and elected in lieu of paying just
9 compensation to not apply certain specified Jackson County land use regulations. Record 135.
10

11 **D. Jurisdiction**

12 Section (9) of Measure 37 provides that “[a] decision by a governing body under this
13 section shall not be considered a land use decision as defined in ORS 197.015 (10).”¹ The
14 applicable ordinary definition of the term “under” is “* * * **8 a** : required by : in accordance with
15 : bound by (~ a contract to deliver)(statement ~ oath)(~ the necessity of selling)(rights ~ the
16 law).” Webster’s Third New Int’l Dictionary, 2487 (unabridged ed 1993). Measure 37 requires
17 two types of decisions by a public entity: (1) decisions regarding whether a written demand for
18 compensation meets the requirements for relief (set forth in section (1) of the measure); and (2)
19 decisions regarding what form of relief to provide if the demand is valid (as set forth in sections
20 (8) and (10) of the measure). In this case, Jackson County made a decision under Measure 37 in
21 its first order (Order 327-05, Record 131-136) that: (1) the written demand of the Lees met the
22 requirements for relief in ORS 197.352; and (2) that in lieu of paying compensation that it would
23 “not apply” certain “land use regulations” to allow the Lee’s to divide their property into four
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1 lots and to establish a new dwelling on each of the three newly created lots. DLCDD did not
2 challenge that order, and that order clearly was a decision “under” ORS 197.352, such that it was
3 not a “land use decision” by application of ORS 197.352(9).

4 Although decisions “under” ORS 197.352 are not land use decisions, actions of local and
5 state government implementing those decisions are not exempted from otherwise applicable
6 requirements of law. After a state agency approves a Measure 37 claim by electing to “not
7 apply” certain state land use regulations to allow the owner to carry out a use, its subsequent
8 authorization of that use through a permit or other form of approval (such as a zone change) is
9 subject to whatever law still applies to that permit or other approval. Similarly, after a city or
10 county makes a determination under Measure 37 to “modify, remove, or not apply” one or more
11 “land use regulations” that it adopted that restrict an owner’s desired use of property, the city or
12 county’s subsequent review of and decision of a “permit” to carry out that use is subject to the
13 requirements for “permits” in ORS 215.402 to 215.437 and ORS 227.160 to 227.184. Nothing in
14 ORS 197.352 repeals these existing statutes, and city and county decisions to approve or deny a
15 “permit” are subject to the statutory procedures for such decisions, including the procedures for
16 review of them by this Board to the extent that they still involve the application of city or county
17 comprehensive plan provisions or land use regulations, or the Statewide Land Use Planning
18 Goals or their implementing rules. ORS 197.015(11); ORS 197.175.

21 As set forth more completely below under the assignment of error, in this decision
22 Jackson County was required to apply Statewide Planning Goal 4 and its implementing rules to
23 its decision on the application for a subdivision and dwellings, and did apply provisions of its
24

26 ¹ There was a codification error in the 2005 ORS, and the cross-reference in ORS 197.352(9) should be to “* * * a
land use decision as defined in ORS 197.015(11).”

1 comprehensive plan and land use regulations. Record 2-3. As a result, the decision is a land use
2 decision that is subject to this Board's exclusive jurisdiction. ORS 197.825.²

3 **ARGUMENT**

4 **ASSIGNMENT OF ERROR**

5 **The County's Order violates state statutes, Statewide Land Use Planning Goal 4, and**
6 **LCDC's Goal 4 implementing rules by authorizing a subdivision and the establishment of**
7 **dwelling on forest land that is prohibited by these laws.**

8 **1. Introduction and Related Litigation**

9 The property that is the subject of the Order is "forest land," as that term is defined in
10 Statewide Land Use Planning Goal 4. Record 28, 38, 127, 135. It is "forest land" because it has
11 been zoned Open Space Reserve (OSR), and the OSR zone is a forest land zone under the
12 Jackson County Comprehensive Plan (JCCP). Exhibit A, 3, 6. Goal 4 provides "[f]orest lands
13 are those lands acknowledged as forest lands as of the date of adoption of this goal amendment."
14 Goal 4 also provides, in pertinent part, that:

15 "Local governments shall inventory, designate and zone forest lands. Local governments
16 shall adopt zones which contain provisions to address the uses allowed by the goal and
17 administrative rule and apply those zones to designated forest lands.

18 "* * * Such zones shall contain numeric standards for land divisions and standards for the
19 review and siting of land uses. Such land divisions and siting standards shall be
20 consistent with the applicable statutes, goal and administrative rule. If a county proposes
21 a minimum lot or parcel size less than 80 acres, the minimum shall meet the requirements
22 of ORS 527.630 and conserve values found on forest lands. * * *"

23 OAR 660-006-0015(1) requires lands inventoried as forest lands to be designated with a zone
24 that conserves forest lands consistent with OAR chapter 660, division 006. Dwellings are
25 allowed on forest lands only if they are authorized by ORS 215.720 to 215.750. OAR 660-006-

26 ² DLCD has petitioned the Jackson County Circuit Court for a Writ of Review concerning the challenged order
(605-06) as a precautionary matter.

1 0025(1)(d); *see also*, OAR 660-006-0027 (regulations for dwellings in forest zones). A land
2 division of forest land is authorized only if it meets the requirements of OAR 660-006-0026 and
3 ORS 215.780. Generally, these requirements set the minimum lot or parcel size for forest lands
4 at 80 acres. A dwelling generally is allowed on lots created before 1985, and in certain other
5 situations.

6 The State of Oregon has already litigated the issue of whether these state land use
7 regulations apply to decisions by Jackson County on a permit implementing a decision under
8 Measure 37 to “not apply” county “land use regulations,” where no decision has been made by
9 the state to “not apply” state “land use regulations.” In *Jackson County vs. All Electors and the*
10 *State of Oregon*, Jackson County Circuit Court Case No. 05-2993-E-3(2), the court has issued its
11 order on cross motions for summary judgment, granting summary judgment to the State. A copy
12 of that order is attached as Exhibit B to this Petition.³ The second issue determined by that court
13 in its opinion was “* * * whether Jackson County may issue permits to successful Measure 37
14 claimants who have not sought or obtained relief from the State for such State regulations as may
15 also apply.” Exhibit B 2-3. That issue was raised in the litigation because the county had
16 adopted another order, Order No. 300-05, directing county employees to issue permits to owners
17 of real property granted relief under Measure 37 by the county, notwithstanding the failure of the
18 owner to file a claim with the State or to obtain relief from the State under Measure 37. The
19 court ruled:
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22 “The Oregon Supreme Court and the Court of Appeals both have made it clear counties
23 must consider applicable state laws when deciding whether to issue land use-related
24 permits, even after the county’s comprehensive plans have been acknowledged and

25
26 ³ DLCD requests that the Board take official notice of this order as decisional law pursuant to Oregon Evidence Code section 202(1), *ODOT v. City of Mosier*, 41 Or LUBA 73, 78 (2001), and of the underling Jackson County order that the decision holds is invalid.

1 accepted by the State. *Smith v. Clackamas County*, 313 Or. 519, 524, 524 n5 (1992)
2 ('sittings of nonfarm dwellings in EFU zones ... remain subject to certain statutes,' e.g.
3 ORS 215.263(3) & (4), even after the county's 'comprehensive and implementing
4 ordinances have been acknowledged'); *Foland v. Jackson County*, 311 Or. 167, 180 n10
5 (1991) ('[t]he local government's decision must, of course, also comply with any relevant
6 statutes'); *Forster v. Polk County*, 115 Or. App. 475, 478 (1992) (both applicable state
7 statutes and county ordinances and rules 'must be interpreted and applied by the county
8 in making its decision' whether to permit construction of a dwelling in an EFU zone');
9 *Kenagy v. Benton County*, 115 Or. App. 131, 136, 136 n3 (1992) ('relevant state statutes
10 remain applicable to local land use decisions after acknowledgment,' i.e., post-
11 acknowledgment 'the statutes are also applicable and the [county's] decisions must
12 satisfy any statutory requirements that are not embodied in the local law'); *Marquam
13 Farms Corp. v. Multnomah County*, 147 Or. App. 368, 380 (1997) ('relevant state
14 statutes retain their independent applicability to local land use decisions after the local
15 legislation has been acknowledged,' in that case, increasing the size of a dog facility on
16 EFU-zoned land).

17 "It is not enough for the County to include a notation in permits granted to
18 successful Measure 37 claimants to the effect that the State may disagree about whether a
19 state-law waiver also is required. The County does not have the authority to sanction a
20 wholesale disregard for compliance with state statutes that also may govern a particular
21 claimant's application for building permits."

22 Exhibit B 9-10 (footnote omitted). Although the circuit court has already ruled against the
23 county on this issue, DLCD acknowledges that the circuit court has not yet issued its judgment in
24 that case. As a result, DLCD provides the following argument concerning the challenged
25 decision in this matter (Order 605-06), drawn from the State's arguments before the circuit court
26 concerning Order 300-05.

2. The Relationship Between State and Local Land Use Regulations.

27 The primary components of Oregon's land use planning system are familiar to this Board.
28 Senate Bill 100 created a state agency—the Land Conservation and Development Commission
29 (LCDC)—to establish and amend statewide land use goals, and to review and "acknowledge" the
30 city and county comprehensive plans and zoning regulations that must be in compliance with the
31

1 statewide goals.⁴ Local governments—cities, counties, and special districts—are responsible for
2 enacting land use regulations to implement their comprehensive plans, and for making land use
3 decisions consistent with the plans, their land use regulations, and any directly-applicable state
4 laws.⁵

5
6 Thus, for example, under the statewide planning goals, local governments are required to
7 designate lands that meet certain criteria for EFU, or for forest uses. In addition, Senate Bill 101
8 provided direct statutory controls on county regulation of EFU-zoned lands.⁶ And, more recent
9 enactments establish statutory controls concerning the subdivision of forest lands, in addition to
10 establishing standards for new dwellings on such land.⁷

11 **3. Measure 37.**

12 Measure 37 was approved at the November 2004 election. The measure adds new
13 statutory provisions to be made part of Oregon’s land use planning system set forth in ORS
14 chapter 197. Under Measure 37, if a public entity enforces an existing land use regulation after
15 the effective date of the measure, or enacts or enforces a new land use regulation, in a way that
16 restricts the use of private real property and reduces the fair market value of that property, “then
17 the owner of the property shall be paid just compensation.”⁸

18 Under section 8 of the measure, in lieu of paying just compensation to the owner, “the
19 governing body responsible for enacting the land use regulation may modify, remove, or not to
20 apply [sic] the land use regulation * * * to allow the owner to use the property for a use
21 permitted at the time the owner acquired the property.”⁹ Under section 11 of the measure, the
22 “‘Owner’ is the present owner of the property, or any interest therein.” In addition, under

23 ⁴ See ORS 197.040(2); ORS 197.175(2). All 36 counties in Oregon have adopted comprehensive plans that have
24 been “acknowledged” by LCDC.

25 ⁵ ORS 197.175(2)(c)-(e), ORS 197.646(3), ORS 197.835(8), see also *Kenagy v. Benton County*, 115 Or App 131,
136, 838 P2d 1076 (1992).

26 ⁶ Or Laws 1973, ch 503.

⁷ See ORS 215.700 to 215.755 (farm and forestland dwellings); ORS 215.780 (land divisions for farm and forest
lands).

⁸ Measure 37, section 1, *codified at*, ORS 197.352(1).

⁹ Measure 37, section 8, *codified at*, ORS 197.352(8).

1 section 10 of the measure, if just compensation is not paid within two years, “the owner shall be
2 allowed to use the property as permitted at the time the owner acquired the property.”¹⁰
3 Allowing the owner to use his or her property in a way that would otherwise be prohibited by the
4 land use laws is commonly referred to as granting a Measure 37 “waiver.”

5 Under section 8 of Measure 37, “* * * in lieu of payment of just compensation under this
6 section, *the governing body responsible for enacting the land use regulation* may modify,
7 remove, or [sic] not to apply the land use regulation or land use regulations to allow the owner to
8 use the property for a use permitted at the time the owner acquired the property.” *Id.* (emphasis
9 added). As a result, when a property owner files a written demand for compensation with a
10 county under Measure 37, and a county elects to “modify, remove, or [sic] not to apply the land
11 use regulation or land use regulations” (hereafter, a decision to not apply, or a “waiver”) the
12 governing body of the county may do so, but *only* with regard to a “land use regulation” that the
13 county’s governing body was “responsible for enacting.”

14 Under ORS 197.175, a county is responsible for enacting comprehensive land use plans
15 in compliance with the statewide land use planning goals approved by LCDC. ORS
16 197.175(2)(a); ORS 215.050. Similarly, a county is required to enact land use regulations to
17 implement its comprehensive plans. ORS 197.175(2)(b), ORS 215.050. Thus, the types of “land
18 use regulations” that a county may elect “not to apply” under section (8) of Measure 37 include
19 the provision(s) of the county’s comprehensive plan and the county’s land use regulations that it
20 adopted to comply with ORS 197.175(2) and 215.050, but that a property owner has
21 demonstrated are the basis for a valid demand for compensation under Measure 37. As a result,
22 when a county takes action under the “waiver” authorization in section (8), it elects “not to
23 apply” certain provisions of that county’s comprehensive land use plan and land use regulations
24 that its governing body has enacted in order to allow the present owner of the property a use of
25 the property permitted when the present owner of the property acquired it.

26

¹⁰ Measure 37, section 10, *codified at*, ORS 197.352(10).

1 **4. The Orders.**

2 **A. The challenged order (Order No. 605-06)**

3 The order that is at issue in this case was adopted by the Jackson County Board of
4 Commissioners to approve a subdivision and the establishment of three additional dwellings on
5 23 acres of forest land. Record 3-4. DLCD appealed the Planning Commission approval of the
6 subdivision and dwellings on the basis that, *inter alia*, “[t]he failure of the owners of the property
7 to obtain an order from the state waiving applicable state laws means that the proposed
8 subdivision is unlawful, as the County is not authorized to approve the subdivision or subsequent
9 development of the subject property when doing so would violate state laws that are still in
10 effect.” Record 247. DLCD’s letter mistakenly identified Goal 3 and its related laws, rather
11 than Goal 4, as the applicable state laws that prohibited the proposed decision. However, neither
12 the county’s notice nor its staff reports identify any state laws as applicable standards or criteria
13 for the subdivision or dwellings. See, *e.g.*, Record 23. The county clearly understood that
14 DLCD was arguing that Goals 3 *and* 4 applied directly to the application. Record 1 (so stating).

15 **B. The Prior Measure 37 Orders (327-05 and 300-05)**

16 The county decided at the outset of the proceedings on this application that “[t]he local
17 county review is limited to the land use regulations enacted by Jackson County in effect on the
18 Lee’s date of interest or ownership.” Record 298. It appears that decision was made pursuant to
19 both the county’s order approving a “waiver” for the Lees in response to their Measure 37 claim,
20 Record 131-136, and the county order that the State successfully challenged in *Jackson County v.*
21 *All Electors and the State of Oregon*, (Order No 300-05).¹¹

22

¹¹ Section 2 of Jackson County Order No. 300-05 provides that

23 “County employees shall issue such permits as were authorized to owners of property that was the subject
24 of an Order of the Board of Commissioners granting relief under Measure 37, notwithstanding the failure of
25 such owners or any previous or subsequent owners, to file a claim with the State of Oregon or to obtain
26 relief from the State of Oregon under Measure 37. To protect the interest of owners and previous and
 subsequent owners of the property, the Orders of the Board of Commissioners, and all permits issued
 pursuant to such Orders, shall advise of the position taken on this issue by the Department of Land
 Conservation and Development.”

1 In Order 327-05, the county recognized that a “waiver” from the State *might* be necessary
2 before the Lees could carry out their desired land division, and noted that this was the State’s
3 position, Record 133-134, but “expresses no opinion in this Order” on this question. Record
4 134. In Order No. 300-05, the order that the circuit court has ruled is invalid, the county went
5 further and directed its employees to issue permits even if no claim had been filed with the State.

6 **5. The Laws that Apply to the Lee’s Subdivision and Dwelling Applications.**

7 **A. State Law Requiring a Permit or Other Authorization Continue to Apply.**

8 Measure 37 says nothing about how public entities are to authorize particular uses of
9 private real property following the “waiver” of applicable county ordinances. That is controlled
10 by other laws that have not been altered by the Measure. When a property owner seeks to carry
11 out the use of property authorized by a county “waiver” of one or more ordinance provisions
12 under section 8, some form of authorization nevertheless still will be required from the county.

13 The reasons for this are twofold. First, most counties, including Jackson County, are not
14 including ordinance provisions that require property owners to obtain permits within the scope of
15 their “waivers” because such laws normally are exempt under section (3)(B) of the Measure
16 (building codes), or because such laws normally will not have the effect of reducing the fair
17 market value of real property (most purchasers will insist on a there being a permit authorizing a
18 use before they purchase the property). Second, and controlling from a legal standpoint, *state*
19 laws, independent of any county ordinance, comprehensive land use plan, or land use regulation,
20 require a permit or land division approval before a use may be carried out, and these *state* laws
21 have not been and cannot be “waived” by a county under section (8) of Measure 37 because they
22 were not enacted by a county.

23 The primary examples of the types of permits or other authorizations required under state
24 law include building and grading permits required by the State Building Code (UBC), and
25 partition and subdivision approvals required under the State’s subdivision and partition laws.

26 _____

Section 2, Jackson County Order No. 300-05. Exhibit B 18.

1 Under ORS 455.450 and the Oregon State Building Code (UBC), section 106.1 “* * * no
2 building or structure regulated by this code [with very limited exceptions] shall be erected,
3 constructed, enlarged, altered, repaired, moved, improved or converted unless a separate permit
4 for each building or structure has first been obtained from the building official.” Similarly,
5 under UBC section 109.1 “[n]o building or structure shall be use or occupied, and no change in
6 the existing occupancy classification of a building or structure or portion thereof shall be made
7 until the building official has issued a certificate of occupancy therefore as provided herein.
8 And, under UBC section 3306 “* * * no person shall do any grading [again, with certain very
9 limited exceptions] without first having obtained a grading permit from the building official.”¹²
10 Finally, as with authorizations for physical changes to real property, ORS 92.0012, ORS 92.016
11 and ORS 92.025 prohibit the sale of land without prior approval of a subdivision or partition
12 approving the creation of the lot or parcel being sold.

13 For counties, the discretionary approval of a proposed “development” of land is a
14 “permit.” ORS 215.402(4). *Doughton v. Douglas County*, 88 Or App 198, 202, 744 P2d 1299
15 (1987) (application for a building permit for a farm dwelling is a ‘permit’ under ORS 215.402);
16 *Frymark v. Tillamook County*, 45 Or LUBA 486 (2003) (a building permit may be a ‘permit’
17 under ORS 215.402, and thus require notice and an opportunity for hearing before taking action
18 on that permit, where approval or denial of the permit requires a discretionary determination
19 regarding whether the proposed use is allowed or not allowed). Even if a use is a permitted use,
20 it is not exempt from state and local laws requiring a permit. *Josephine County v. Garnier*, 163
21 Or App 333, 339, 987 P2d 1263 (1999).

22 In sum, state laws requiring the Lees to obtain a permit in order to carry out the use
23 authorized by Jackson County under its Order 327-05 continue to apply even after the county’s
24 “waiver” decision. Again, that is because (under section (8) of the Measure) the county is
25 authorized only to “not apply” “land use regulations” that the county’s governing body enacted.

26 ¹² The State notes that the State Building Code is expressly exempt from Measure 37 under section 3(B) of the
measure. This is another reason why the requirement to obtain a permit is unaffected by a county “waiver.”

1
2 **B. The Substantive State Laws that Apply to the Lee's Subdivision Application**
3 **Prohibit that Use.**

4 When the owner who has received a "waiver" from a county under Measure 37 seeks a
5 building permit, a grading permit, an occupancy permit, a land division approval, or some other
6 form of approval from the county, what standards and criteria will apply to *that* approval? The
7 answer to this question also answers the question of why the challenged decision violates
8 applicable state law.

9 Much confusion stems from the fact that once a county's comprehensive plan and land
10 use regulations are acknowledged by LCDC as complying with the statewide land use planning
11 goals,¹³ a county must make land use decisions in compliance with its acknowledged plan and
12 land use regulations; and the statewide land use planning goals and LCDC rules implementing
13 those goals normally do not apply directly to a county's post-acknowledgment land use
14 decisions. ORS 197.175(2).¹⁴ Some have assumed that this means that *only* the county's
15 acknowledged plan and land use regulations apply to its decisions. In the context of Measure 37,
16 some may argue that this means that once a county "waives" its applicable local land use
17 regulations, and an owner applies for a permit to carry out the use authorized by the "waiver,"
18 the county would have already acted to "not apply" any and all "land use regulations" that would
19 otherwise prohibit or restrict the owner's desired use, with the result that the county could
20
21

22 _____
23 ¹³ "Acknowledgement" means that LCDC has determined that a county or a city's comprehensive plan and land use
24 regulations comply with the statewide land use planning goals adopted by LCDC. ORS 197.250 to 197.254. All
25 cities and counties in Oregon have had their comprehensive plans and land use regulations acknowledged by LCDC.
26 Prior to acknowledgement, both the local comprehensive plan and land use regulations, *and* the LCDC goals applied
as the standards and criteria for local land use decisions and permits. ORS 197.175(2)(c). Following
acknowledgment, the statewide land use planning goals generally do not apply to local land use decisions. *See also,*
Columbia Hills Dev. Co. v. LCDC, 50 Or App 483, 624 P2d 157, *rev den*, 291 Or 9 (1981).

¹⁴ *But see*, ORS 197.646. New or amended provisions of the statewide land use planning goals, and LCDC rules
implementing those provisions, apply directly to land use decisions if a city or county fails to adopt amendments to
its comprehensive plan and land use regulations to carry out those changes in state law.

1 lawfully issue its permit or other authorization and the owner could lawfully carry out his desired
2 use.¹⁵

3 The assumption that *only* a county's comprehensive plan and land use regulations apply
4 to its decisions to approve or deny a permit or other authorization of a use is wrong. Lands in a
5 forest zone or otherwise designated as forest land, such as the Lees' property, remain subject to
6 state statutes that specify the standards for the establishment of any dwelling on the property, and
7 for minimum lot or parcel sizes for any land division. The principal state statutes that govern
8 such uses in Jackson County are ORS 215.705 (dwelling in farm or forest zones), ORS 215.720
9 (forestland dwellings), ORS 215.730 (additional criteria for forestland dwellings), ORS 215.740
10 and ORS 215.750 (other forestland dwellings), ORS 215.755 (other forest land dwelling criteria),
11 and ORS 215.780 (minimum lot or parcel sizes for farm zones and for forest zones).

12 In particular, ORS 215.780(1)(c) establishes a minimum lot or parcel size of 80 acres for
13 land designated forestland. As noted above, the Lees' property is designated as forestland.
14 Record 28, 38, 127, 135. As a result, the county's approval of a subdivision creating five-acre
15 lots was unlawful under ORS 215.780(1)(c).

16 Similarly, there are no findings in the record establishing that the three additional
17 dwellings that the Lees seek to establish meet the requirements of ORS 215.705, ORS 215.720,
18 ORS 215.730, ORS 215.740, ORS 215.750 or ORS 215.755. As a result, to the extent that Order
19 No. 605-05 purports to authorize the establishment on any additional dwellings on the property,
20 it is unlawful for that reason as well.

21 When a property owner who has received a "waiver" from a county under ORS 197.352
22 applies for a building permit, occupancy permit, land division, or other authorization for land
23 zoned for exclusive farm use or for forest use to carry out the use, the county is required to apply

24 ¹⁵ However, because section (8) of Measure 37 limits government's "waiver" authority to a use permitted at the time
25 the owner acquired the property, the statewide land use planning goals will apply if the owner acquired the property
26 on a date after the particular statewide goal took effect and before the county's comprehensive plan and land use
regulations were acknowledged. In general, this occurs with owners who acquired their property after January 1,
1975 and before the mid 1980s. The dates of acknowledgement vary from county to county, and in many cases
different parts of a county's ordinances were acknowledged at different times.

1 these state statutes as standards and criteria in determining whether the requested authorization is
2 lawful. In *Smith v. Clackamas County*, 313 Or 519, 836 P2d 716 (1992), the Court stated that *in*
3 *addition to the county's acknowledged ordinances*, the county was required to apply the statutes
4 in ORS chapter 215 in determining whether to issue a building permit for a dwelling on land
5 zoned for exclusive farm use.

6 “We do note that sitings of nonfarm dwellings in EFU zones,
7 where that requires a division or partitioning of farm land,
8 currently appears to remain subject to certain statutes bearing
9 directly on that issue. ORS 215.263(4) permits county approval of
10 such a division of land ‘only if the dwelling has been approved
 under ORS 215.213(3) or 215.283(3).’ Moreover, ORS 215.288
 provides that the county *must* apply certain statutory provisions to
 land which has been zoned for exclusive farm use (EFU), when
 considering whether and where to permit certain dwellings.”

11 *Id.* at 523 n 5. Similarly, in *Foland v. Jackson County*, 311 Or 167, 180 n 10, 807 P2d 801
12 (1991) (involving a comprehensive plan amendment for a destination resort), the court noted that
13 “[t]he local government’s decision must, of course, also comply with any relevant statutes,” in
14 addition to the county’s acknowledged ordinances.

15 The Court of Appeals has been more direct. In *Forster v. Polk County*, 115 Or App 475,
16 478, 839 P2d 241 (1992) that court held that ORS 215.283(1)(f) applied to a county’s decision
17 on a permit for a farm dwelling in addition to the county ordinance. In *Kenagy v. Benton*
18 *County*, 115 Or App 131, 134-135, 838 P2d 1076 (1992), the court determined that ORS
19 215.283(1)(e) applies directly to a county’s decision on a permit for a dwelling for a relative of a
20 farm operator. And in *Friends of the Metolius v. Jefferson County*, 125 Or App 122, 125 n 2,
21 860 P2d 278 (1993), the court again noted that even once the statewide planning goals no longer
22 apply to county decisions, state statutes do. The Court of Appeals continues to review local
23 decisions concerning uses of land zoned for exclusive farm use or forest use for compliance with
24 applicable statutes in ORS chapter 215. *See, e.g., Friends of the Creek v. Jackson County*, 165
25 Or App 138, 141 n1 995 P2d 1204 (2000) (utility facilities on EFU-zoned land); *Marquam*
26 *Farms Corp. v. Multnomah County*, 147 Or App 368, 380, 936 P2d 990 (1997) (dog kennels on

1 EFU-zoned land), and *Friends of Neabeack Hill v. City of Philomath*, 139 Or App 39, 46, 911
2 P2d 350, *rev den* 323 Or 136 (1996) (subdivision approval).

3 Like the Court of Appeals, this Board also consistently has determined that the state
4 statutes in ORS chapter 215 apply directly to county decisions on a variety of types of
5 authorizations. In *Ramsay v. Linn County*, 30 Or LUBA 283, 289 (1996), this Board held that
6 ORS 215.283(1)(f) applies directly to a county's decision on a permit for a farm dwelling. In
7 *Mission Bottom Assoc. Inc., v. Marion County*, 29 Or LUBA 281, 295 (1995), this Board held
8 that ORS 215.296 applies directly to a county's decision on a plan amendment and permit for
9 aggregate mining. And in *City of Sandy v. Clackamas County*, 28 Or LUBA 316, 319-320
10 (1994), this Board decided that ORS 215.213(2)(c) and ORS 215.283(2)(a) apply directly to a
11 county decision on a permit for a commercial use in conjunction with a farm use.

12 In short, state statutes continue to apply to uses that a county authorizes under Measure
13 37. Until action is taken to make these statutes "not apply" to these uses, a county is prevented
14 by state law from lawfully issuing a permit or other authorization for the use.

15
16 **C. Issuance of a State "Waiver" for the Lees Will Not Alter Whether Order
17 605-06 Was Lawful.**

18 In the event that the State of Oregon also issues an order to "not apply" certain state "land
19 use regulations" to allow the Lees to carry out a use that was permitted when they acquired the
20 property, that decision will not alter whether the challenged decision (Order No. 605-06) was
21 lawful. The reason for that is ORS 215.427(3), which provides in pertinent part that: "* * *
22 approval or denial of the application shall be based upon the standards and criteria that were
23 applicable at the time the application was first submitted." As a result, even if the State were to
24 no longer apply certain state land use regulations, they would still apply to the approval or denial
25 of the Lee's subdivision application. *Davenport v. City of Tigard*, 121 Or App 135, 854 P2d 483
26

1 (1993) (changes to the law that occurred after the application was complete are not standards and
2 criteria for the application).

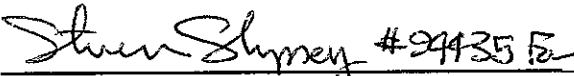
3 **CONCLUSION**

4 For the foregoing reasons, DLCD respectfully requests that this Board reverse Jackson
5 County Order No. 605-06.

6
7 DATED this 24th day of January 2007.

8
9 Respectfully submitted,

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18 OF LAND CONSERVATION AND
19 DEVELOPMENT
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Jackson County Comp. Plan

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MAP DESIGNATIONS¹

NATURE OF THE MAPS:

The Comprehensive Plan maps are general diagrams which graphically depict the allocations of projected land use needs and patterns in the County, and reflect the goals, policies, and implementation strategies embodied in the text and elements of the Plan. Some of the information shown on the Plan maps include land use categories, urban growth boundaries, incorporated municipal boundaries, major transportation routes, and major rivers and stream courses. These maps include the Countywide general land use map entitled "Jackson County Comprehensive Plan Map", the unincorporated community detail plan maps for individual geographic areas of the County such as White City, and the background maps supporting the individual elements of the Jackson County Comprehensive Plan. When the terms "Comprehensive Plan Map" or "Plan map" are used in the Map Designations Element, the reference is intended to be to the Jackson County Comprehensive Plan Map except where an unincorporated community plan map exists where the reference is to the applicable unincorporated community plan map.

Zoning maps are separate diagrams that refine the Plan map by specifically depicting the allocations of existing and near term land uses within each of the broader Comprehensive Plan Map Designations. Zoning districts are established in accordance with the corresponding Plan map designations to further refine varying levels of density and development intensity permitted by the Plan map. Appropriate density and development intensity is determined in a manner consistent with the Comprehensive Plan policies and guidelines applicable to each area of the County. As such, the Plan and Zoning maps cannot be used independently from, or take precedence over, the written portion of the Plan text.

RELATIONSHIP OF THE PLAN TEXT TO THE PLAN MAPS:

The Plan maps are site-specific expression of the goals, findings, policies, and implementation strategies found in the Plan text. The arrangement and distribution of existing and projected land uses illustrated on the maps is based on the elements and principles embodied in the written Plan. Together, the Plan maps and text provide the overall framework within which more detailed planning can occur.

The Jackson County Comprehensive Plan was first acknowledged by the Oregon State Land Conservation and Development Commission in 1983 as consistent with the Statewide Planning Goals and ORS 197. The Map Designations Element adopted therein established how the entire area of the County was inventoried to determine appropriate land uses on a broad scale. This Element set forth the criteria and characteristics of lands for each Plan designation. As a rule, some type of resource land designation was required for all land located outside urban growth boundaries unless identified within a Goal 3 or 4 exception area. The inventory of Goal 3 and 4 exception areas was determined by criteria set forth in the Goal Exceptions Element of the Plan. For example, an island made up of a single property or group of properties that may not have met all of the resource lands mapping criteria, but was under 20 acres surrounded by resource lands which did meet the criteria, was designated as within resource lands unless an

¹Adopted by Ordinance #82-26 on 10-20-82, effective 12-19-82 (File 82-50-OA); replaced by Ordinance #2002-16 adopted 7-17-02, effective 9-15-02 (File 2000-7-OA); replaced by Ordinance #2004-1 adopted 1-12-04, effective 3-12-04 (File 2003-1-OA).

TABLE 4-1	
Comprehensive Plan Map Designations	Implementing Zoning Districts
Forestry/Open Space Land	Forest Resource (FR), Woodland Resource (WR), and Open Space Reserve (OSR)
Agricultural Land	Exclusive Farm Use (EFU)
Aggregate Resource Land	Aggregate Removal (AR) District
Rural Use	RU
Rural Residential Land	RR-2.5, RR-5, RR-5(A), RR-10 and RR-00
Urban Residential Land	UR-1, UR-4, UR-6, UR-8, UR-10, and UR-30
White City Urban Residential Land	WCUR-4, WCUR-6, WCUR-8, WCUR-10, WCUR-30
Urbanizable Area	Mutually adopted zoning districts administered by a City pursuant to an urban growth boundary management agreement.
Limited Use	Limited Use (LU)
Commercial Land	General Commercial (GC), Interchange Commercial (IC), Neighborhood Commercial (NC), Rural Service Commercial (RS), and Unincorporated Communities Rural Service Commercial (ARS, RRS, SVRS)
Industrial Land	General Industrial (GI), Light Industrial (LI), and Rural Limited Industrial (RLI)

FORESTRY/OPEN SPACE LAND

1) Purpose

To conserve forest lands for forest uses and ensure a continued yield of forest products. The Forestry/Open Space designation in this Plan restricts the type and intensity of development on forest, woodland, and open space lands to preserve the economic base of Jackson County and to reduce conflicts between rural development and forest resource management. This designation is also intended to protect and provide for compatible forest uses, fish and wildlife habitat, watershed and aquifer recharge areas, recreational opportunities, scenic attributes, and other natural resources including unique scientific, ecological, botanical, or geologic areas.

2) Map Designation Criteria:

- A) The four principal forest land environments² described in the Forest Lands Element of this Plan are inventoried as commercial forest lands and must be designated for Forestry and Open Space unless the land is otherwise qualified as agricultural or aggregate resource land, or an exception to Goal 4 is taken. The generalized boundary of the principal forest land environments is depicted on the Forest Land Environments map in the Forest Land Element. The specific boundary in relation to individual parcels is determined based on the text description of the Forest/Woodland transition elevations described in the Geographic Location and Conditions section of the Forest Lands Element. The valley floors, terraces, and slopes depicted on the Forest Lands Element profile illustrations are lands below the noted transition elevations, and are not part of the commercial forest base. Tracts of land located predominantly below the noted transition contour will similarly be inventoried as being outside the principal forest land environment and may be considered for Woodland or a rural designation found to be compatible with adjacent forest area.
- B) Woodland areas within or near the physiographic areas discussed in (A) above, but located at or below the established elevation contour lines for commercial forest land environments, on which production of timber and wood fiber is, or can become, a primary use of the land are also designated for Forestry/Open Space unless the land is otherwise qualified as agricultural or aggregate resource land. These lands are generally in private nonindustrial ownerships, with some wood product industry and less productive publicly owned lands; have parcel sizes predominantly greater than 20 acres; have been specially assessed or are interspersed among similar properties that have been specially assessed as forest or wood land; and have a cubic foot site class potential for timber production or occur adjacent to and buffer productive forest lands.
- C) Transition areas of intermingled agricultural and forest lands, and areas not generally suited to intensive land uses or development for a broad range of physical and natural factors, where no other appropriate rural designation exists, are designated for Forestry/Open Space unless the land is otherwise qualified as

²The forest resource is distributed throughout four specific forest land environments in the County: the Cascade Slope, South Siskiyou, Rogue-Umpqua Divide, and Rogue-Applegate Upland regions.

agricultural land aggregate resource land. These lands are generally poorer forest capability lands than found in the Woodland Resource zoning districts or are located on lands with no forest capability combined with poor agricultural soils such as occurs in the Agate Desert.

- D) Map amendment requests may demonstrate that property is not located in forest land environments described herein by providing substantive site specific evidence which clearly indicates that the subject property is not forest land or woodland as outlined in the Forest Lands Element of the Jackson County Comprehensive Plan.
- E) Except where another resource land designation is requested, or where justified through the Goal Exceptions process, Goal 4 is deemed to apply and the Forest/Open Space designation will not be removed from:
- i) Lands within the principal forest land environments described in subsection 2A above or woodlands described in 2B above; or,
 - ii) Lands which would qualify as agricultural lands as defined under Statewide Planning Goal 3 and ORS Chapter 215; or,
 - iii) Lands within mountainous lands where the majority of acreage is comprised of slopes where the average grade exceeds 40% or where the majority of acreage is otherwise subject to risk from identified natural hazards (e.g., rapidly moving landslides); or,
 - iv) Lands with no legal public road access or where the only public road access is by Bureau of Land Management or Forest Service roads; or,
 - v) Lands including or adjacent to inventoried Goal 5 natural resource areas except where a Goal 5 review of conflicting uses justifies the proposed land use map designation; or,
 - vi) Lands adjacent to, intermingled with, or needed for access to public or private commercial forest lands; or,
 - vii) Lands under a federal or state timber management program; or,
 - viii) Lands identified as being needed for watershed or aquifer recharge maintenance protection; or,
 - ix) Lands having outstanding or unusual ecological, botanical, geological, scenic, or other natural resource characteristics; or,
 - x) Lands outside rural fire protection districts or deemed too remote from other essential public services to support the requested change of use; or,
 - xi) Lands where the feasibility of providing on-site septic disposal systems and domestic water supply has not been established; or,

- xii) Lands that are needed to provide a natural buffer between the commercial forest stands and existing nonresource or exception areas; or,
 - xiii) Lands that include public use reservoirs or lakes as a predominant feature.
- F) Where it can be demonstrated with substantive findings the lands currently designated as Forestry/Open Space pursuant to sections 2A through 2C above do not merit Goal 4 protection pursuant to section 2D above, a rural lands designation may be established that is otherwise consistent with the Statewide Planning Goals and the Jackson County Comprehensive Plan. An appropriate rural zoning district may then be applied to the land consistent with the Comprehensive Plan map designation requirements and the Jackson County Land Development Ordinance.
- 3) Establishment of Zoning Districts:
- A) The Forest Resource (FR) zoning district will be established for the Forest/Open Space Land described in 2(A) above.
 - B) The Woodland Resource (WR) zoning district will be established for Forest/Open Space Land described in 2(B) above.
 - C) The Open Space Reserve (OSR) zoning district will be established for the Forest/Open Space Land described in 2(C) above.
 - D) Permissible development standards will be established for these districts in the Jackson County Land Development Ordinance in accordance with state law and the Jackson County Comprehensive Plan.

FOREST LANDS¹

GOAL: TO CONSERVE FOREST LANDS FOR FOREST USES AND ENSURE A CONTINUED YIELD OF FOREST PRODUCTS.

INTRODUCTION:

Forest lands, identified as Forest Resource on the Comprehensive Plan Map, are of critical environmental, economic, and social importance to Jackson County.

In order to stabilize and conserve the forest land base for present and future resource needs, development and land uses allowed within the area are only those considered compatible with the forest environment. Managing, growing, and harvesting of timber will continue to be a dominant land use on the majority of this land, as are activities governed by the state's Forest Practices Act (ORS Chapter 527) which specifies minimum standards to safeguard against environmental damage. The County cannot adopt regulations which set more stringent standards than the Act.

The Forest Lands Element identifies the forest resource, provides a discussion of land use-related issues and management practices which may affect the resource and the timber industry, and prescribes the County's future intentions for protection of the forest through goals, policies, and implementation strategies.

This element is related in varying degrees and significance to other portions of the Comprehensive Plan, including the Economy, Agricultural Lands, Recreation, Natural and Historic Resource, Natural Hazards, and Environmental Quality Elements. These elements all contribute to a more detailed and thorough understanding of forest resource issues and concerns.

FOREST LANDS AND USES DEFINED:

For land use planning purposes, forest lands are defined as: 1) lands composed of existing and potential forest lands which are suitable for commercial forest uses; 2) other forested lands needed for watershed protection, wildlife and fisheries habitat, and recreation; 3) lands where extreme conditions of climate, soil, and topography require the maintenance of vegetative cover, irrespective of use; 4) other lands which lie adjacent to urban and agricultural areas and which provide urban buffers, windbreaks, wildlife and fisheries habitat, scenic corridors, and recreational use; and, 5) ranching and grazing areas in the above environments.

Forest uses permitted on these lands include: 1) the production of trees and light processing of forest products; 2) open space, buffers from noise, and visual separation of conflicting uses; 3) watershed protection and wildlife and fisheries habitat; 4) soil protection from wind and water; 5) maintenance of clean air and water; 6) outdoor recreational activities and related support services and wilderness values compatible with these uses; and, 7) grazing land for

¹ Amended by Ordinance #94-60; acknowledged by DLCD Order #00119 dated 9-2-94; effective 9-12-94; Planning file 93-18-OA.

livestock. Forest lands may accommodate several land uses which are inherently, or can be made, compatible with Statewide Planning Goal 4, Forest Lands, and the Oregon Administrative Rules for Forest Lands (OAR 660, Division 6).

Forest lands include heavily timbered areas, areas which are now or were formerly stocked by live coniferous or hardwood trees, brushlands, grasslands, meadows, and barren mountainous areas. Within Jackson County's forest land, there are two distinct resource types:

Commercial Forest Lands are areas where sustained timber production and preservation of a self-perpetuating forest environment is considered to be the dominant land use. These lands are principally located in higher elevations; are, for the most part, owned and/or managed by the Bureau of Land Management, the U. S. Forest Service, or wood products industry for large scale commercial timber production; have parcel sizes of 40 acres or greater; and, are specifically assessed as forest land and/or have a cubic foot site class rating of between 2+ and 5, as discussed later in this element.

Woodland areas are those on which production of timber and wood fiber is, or can become, a primary use of land. These lands are generally located at or below the established elevation contour lines for commercial forest lands; are generally in private nonindustrial ownerships, with some wood product industry and less productive publicly owned lands; have parcel sizes predominantly greater than 20 acres; are specially assessed as forest land or have a cubic foot site class potential for timber production; or, occur adjacent to, and buffer, other forest lands.

Incorporation of both resource types into one Forest Resource designation was based, in part, on interpretation of the Forest Rule (OAR 660, Division 6) and Statewide Planning Goal 4.

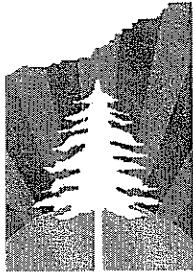
GEOGRAPHIC LOCATION AND CONDITIONS:

The forest resource is distributed throughout four specific forest land environments in the county: the Cascade Slope, South Siskiyou, Rogue-Umpqua Divide, and Rogue-Applegate Upland regions, as shown on the following forest land map. Geographic factors play a key role in determining the boundaries of these environments and their suitability for growing trees.

Topography is a controlling influence on forest productivity. Basins and benches along a slope or high elevation convex surface can affect tree growth and regeneration potential due to frost, high winds, and increased rates of evaporation and transpiration. Wide mountain valleys, such as the Rogue River/Bear Creek drainage basins, are generally hotter and drier than average for their elevation, while narrow valleys protected from direct solar radiation part of the day are cooler and more moist. Slope and aspect influence the intensity and duration of direct solar radiation and the levels of soil and air temperature. Slope affects soil stability, and elevation affects temperature, moisture, and the length of the growing season.²

Soil and moisture are obvious determinants of tree growth. The site index measure of tree growth is directly linked to soils which are formed as a response to such factors as precipitation, slope, aspect, temperature, vegetative cover, and type of parent material. In Jackson County, varied seasonal rainfall and low humidity, combined with high temperatures from intensive solar

²Cleary, et al: Regenerating Oregon's Forests, 1978.



**JACKSON
COUNTY**
Oregon

2004

**LAND
DEVELOPMENT
ORDINANCE**

Ordinance #2004-2
Effective March 12, 2004

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4.3 FOREST RESOURCE (FR) DISTRICTS

4.3.1 Purpose

The purpose of the Forest Resource (FR) zoning Districts is to conserve forest lands. This Section implements Statewide Planning Goal 4 (Forest Lands) and OAR 660.006.

4.3.2 Application

Various zoning districts are applied to areas that are identified as forest land by the Jackson County Comprehensive Plan. These lands are designated in the Comprehensive Plan and on the comprehensive plan map(s) as Forest Open Space (FOS). The adopted Zoning map(s) divide the FOS designated lands into three zoning districts; Forest Resource (FR), Woodland Resource (WR), and Open Space Reserve (OSR).

4.3.3 Table of Permitted Uses^b

Table 4.3-1 sets forth the uses allowed subject to Type 1, 2, 3, or 4 approval procedures in the forest districts. This table applies to all new uses, expansions of existing uses, and changes of use when the expanded or changed use would require a Type 2, 3 or 4 review, unless otherwise specified on Table 4.3-1.

A) **Type 1**

A "1" in the Table indicates that a use is allowed by-right, provided it complies with any standards listed in the "See Also" column.

B) **Type 2**

A "2" in the Table indicates that a use is subject to administrative review and approval, in accordance with the Type 2 review procedures of Section 3.1.3.

C) **Type 3**

A "3" in the Table indicates that a use may be conditionally allowed, subject to review and approval in accordance with the Type 3 review procedures and approval criteria of Section 3.1.4.

D) **Type 4**

A "4" in the Table indicates that the use is subject to review and approval by the Planning Commission and Board of County Commissioners, as applicable, in accordance with the Type 4 review procedures of Section 3.1.5.

E) **Numerical References**

The numbers contained in the "See Also" column are references to additional standards and requirements that apply to the use type listed. Uses are also subject to applicable standards of Chapters 7, 8 and 9.

G) **Accessory Uses and Structures**

Accessory uses and structures are allowed in all zoning districts (Section 6.4).

Ordinance 2004-2RM, effective 1-30-2005; Ordinance 2004-14, effective 2-13-2005

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5.2 RESOURCE DISTRICTS

The purposes of the resource districts are set forth below. The resource districts are fundamentally different from all other districts established in the County. While the County's authority under Oregon law to regulate development in the rural residential, urban residential, commercial, and industrial districts is broad, the County's authority to regulate development in the resource districts is strictly governed by state law. For this reason, the uses permitted and the standards for development in the resource districts are set forth in a separate part of this Ordinance: Chapter 4: Resource Districts. All uses in the resource districts will comply with the general dimensional standards set forth in Chapter 8.

5.2.1 Exclusive Farm Use (EFU)

This district is intended to conserve agricultural land, and implements the Oregon Agricultural Land Use Policy, ORS 215.243, Oregon Administrative Rules, and Statewide Planning Goal 3 (Agricultural Lands). See Section 4.2 of this Ordinance.

5.2.2 Forest Resource (FR); Woodland Resource (WR); Open Space Reserve (OSR)

These districts are intended to conserve forest lands and implement the Oregon Administrative Rules, and Statewide Planning Goal 4 (Forest Lands). See Section 4.3 of this Ordinance.

5.2.3 Aggregate Removal (AR)

The purpose of this district is: to allow the development and use of significant mineral and aggregate resources subject to uniform operating standards; to balance and resolve conflicts between surface mining activities and activities on surrounding land; and to ensure the protection of natural resources and the reclamation of mined land. See Section 4.4 of this Ordinance.

5.3 RURAL RESIDENTIAL ZONING DISTRICTS

The purposes of the rural residential zoning districts are set forth below. The allowed uses for each of the districts are set forth in Table 6.2-1. All uses must comply with the applicable development standards of this Ordinance.

5.3.1 Rural Use (RU) District

The purpose of this district is to provide a designation for lands that are not urban or urbanizable, and either do not meet the state definitions of agricultural or forest land, or qualify for an exception to Statewide Planning Goals 3 and/or 4.

5.3.2 Rural Residential (RR-2.5, RR-5, RR-5(A), RR-10, RR-00)

The purpose of the rural residential zoning districts is to provide for large-lot residential areas, consistent with the predominant rural character of the area and the physical capability of the land. The RR-00 district is established for areas where there are physical limitations in water, or land resources or service availability, or for areas where rural residential divisions could inhibit future urban development.

5.4 URBAN RESIDENTIAL ZONING DISTRICTS

The purposes of the urban residential zoning districts are set forth below. The allowed uses for each of the districts are set forth in Table 6.2-1. All uses must comply with the applicable development standards of this Ordinance.

5.4.1 Urban Residential (UR-1, UR-4, UR-6, UR-8, UR-10)

The purpose of these districts is to encourage, provide, and protect suitable environments for single- and multiple-family residences within urbanized areas of the County where public services and facilities are available, and to provide planned residential areas with densities up to 10 dwellings per acre.

300-05 (“the Order”). The County asks the Court to rule on the validity of two sections of Order No. 300-05, Section 1 on transferability of Measure 37 claims and Section 2 on State involvement with Measure 37 claims.

Section 1 reads as follows:

All relief granted by the Jackson County Board of Commissioners under Measure 37 shall be transferable to subsequent owners of the property. To protect the interests of claimants and subsequent owners of the property, Orders of the Board of Commissioners granting relief under Measure 37, and all permits issued pursuant to such Orders, shall continue to advise of the position on this issue taken by the Department of Justice. County employees shall issue such permits to subsequent owners of property that was granted relief under Measure 37.

Section 2 reads as follows:

County employees shall issue such permits as were authorized to owners of property that was the subject of an Order of the Board of Commissioners granting relief under Measure 37, notwithstanding the failure of such owners or any previous or subsequent owners, to file a claim with the State of Oregon or to obtain relief from the State of Oregon under Measure 37. To protect the interests of owners and previous and subsequent owners of the property, the Orders of the Board of Commissioners, and all permits issued pursuant to such Orders, shall advise of the position taken on this issue by the Department of Land Conservation and Development.

Jackson County’s lawsuit is in the form of a declaratory judgment for judicial examination pursuant to ORS 33.710. In order to enter the requested judgment on the validity of the Order, the Court must examine and determine two issues: (1) the extent, if any, to which Measure 37 claims may be transferred to new owners, and (2) whether

Jackson County may issue permits to successful Measure 37 claimants who have not sought or obtained relief from the State for such State regulations as may also apply.²

THE PARTIES' POSITIONS ON TRANSFERABILITY

Jackson County's position on transferability is set forth succinctly in the Order and is restated in the Stipulated Facts. It is Jackson County's position that "[a]ll relief granted by the Jackson County Board of Commissioners under Measure 37 shall be transferable to subsequent owners of the property." (Order 300-05, § 1; Stipulated Fact No. 6).

The State takes a contrary position, set out in a letter from the Office of the Oregon Attorney General to the Director of the Oregon Department of Land Conservation and Development dated February 24, 2005, of record in this case as Exhibit 2 to the Affidavit of Katherine G. Georges submitted by the State ("AG Letter"): "relief [provided under Measure 37] is personal to the current owner of the real property. If the current owner of the property conveys the property before the new use allowed by the public entity is established, then the entitlement to relief will be lost." (AG Letter p. 1; Stipulated Fact No. 7).

THE STANDARDS FOR INTERPRETING MEASURE 37

In interpreting a statute codifying an enacted ballot measure, the Court's task "is to discern the intent of the voters. The best evidence of the voters' intent is the text of

² On October 11, 2006, the parties submitted a 14-item list of stipulated facts, most of which deal with the status of various parties to this action, the source of the Court's jurisdiction, and a summary of the parties' positions in this matter. The Court has considered these stipulated facts in reaching the conclusions set out in this opinion. Neither party has submitted any additional facts that are in dispute, nor does the Court find any disputed facts precluding the entry of the requested declaratory judgment.

³ Order on Cross-Motions for Summary Judgment

the provision itself.” *Roseburg School District v. City of Roseburg*, 316 Or. 374, 378, 378 n.4 (1993) (“The text of a document must always be the starting point in any interpretative endeavor”); *Stranahan v. Fred Meyer, Inc.*, 331 Or. 38, 58 (2000) (“As always, we begin with the text ...”). If there are “related ballot measures submitted to the voters at the same election,” *Ecumenical Ministries of Oregon v. Oregon State Lottery Commission*, 318 Or. 551, 559 (1994), the Court considers them as the “context” in which the challenged provision is placed. In this case, there were no ballot measures related to Measure 37 on the November 2004 ballot.

In determining the meaning of the text, the Court looks to definitions of terms within the text and to the “plain, natural, and ordinary meaning” of undefined terms. *Ecumenical Ministries*, 318 Or. at 560. The Court may neither ignore text nor add language that is not part of the text. ORS 174.010.

Although “caution is required in ending the analysis before considering the history of an initiat[ive],” *Ecumenical Ministries*, 318 Or. at 559, n.7, “if the intent [of the voters] is clear based on the text and context ... , the court does not look further.” *Roseburg*, 316 Or. at 378; *Coultas v. City of Sutherlin*, 318 Or. 584, 590 (1994) (court examines history “if there is a plausible alternative reading presented to the court”).

ARE MEASURE 37 CLAIMS TRANSFERABLE?

Section 1 of Measure 37 provides if the County enacts or enforces certain land use regulations which restrict the use of private property and reduce the value of the property, the owner shall be paid just compensation.

Section 6 of Measure 37 provides if the regulation continues to apply for more than 180 days after the present owner has submitted a written demand for compensation, the present owner can sue the County for compensation, attorney fees and other expenses of litigation.

Section 8 of Measure 37 provides instead of the payment mentioned in Section 1 the County may modify, remove or not apply the land use regulation(s) to allow the owner to use the property for a use permitted at the time the owner acquired the property.

Section 10 of Measure 37 provides if the County has not paid compensation due within two years of its accrual, the owner is allowed to use the property as was permitted at the time the owner acquired the property.

“Owner” is defined by Section (11) (C) as “the present owner of the property, or any interest therein.”

The terms “transfer,” “transferability,” “transferable,” and “subsequent owner” are not found in Measure 37.

Measure 37 did not repeal or amend any existing land use law. All land use laws which were in effect prior to the passage of Measure 37 remain in place today. What Measure 37 does is provide a method by which the “present owner” of a parcel could receive compensation or relief from enforcement if the land use regulation diminished the value of his/her property.

When read in context, Measure 37 makes it clear what is meant by “present owner.” The “present owner” must satisfy a requirement of being the owner on two

dates. First, she/he must be the owner at the time the restrictive regulation is passed. Section 1 does not apply to land use regulations “[e]nacted prior to the date of acquisition of the property by the [present] owner.” Section (3) (E).

The second date on which the present owner must qualify to receive the benefit of Measure 37 is “the date the [present] owner makes written demand for compensation... .” Section (2). In both cases, the definition of the owner is the same. There is no provision in Measure 37 for previous or subsequent owners.

Under Measure 37 the County has a choice of how to treat the owner who meets the qualifications of ownership on both dates. Section 8 provides in lieu of the payment of compensation as required by Section 1, the County “may modify, remove, or not apply the land use regulation[s] to allow the [present] owner to use the property for a use permitted at the time the [present] owner acquired the property.” The language of Measure 37 is clear: the word “owner” means the person who was the then-present owner at the time the restrictive regulation was enacted as well as the owner on the date when he/she made written demand for compensation.

The term “owner” is used consistently throughout Measure 37. Measure 37 does provide for one situation where a person other than the owner at the time of the passage of the regulation may receive Measure 37’s benefit. Section (3) (E) allows a claimant to benefit as an “owner” at the time the restrictive regulation was passed if the property was owned at that time by a family member. Family member is defined in Section (11) (A). No other exceptions can be found in Measure 37.

In documents filed with this Court Jackson County recognized it is the “present owner,” as defined by Measure 37, who is entitled to *apply* for relief when there is a “loss of value resulting from land use regulations that have been placed on the property since the claimant first acquired an interest in the property.” Petitioner’s Response to Respondent’s Motion, p. 1. (emphasis added). The County asserts, however, any and all “subsequent owners” also obtain the “do not apply” order benefits granted to the successful claimant, even if the successful claimant has taken no steps to act on that relief by the time she sells her interest in the property to the subsequent owner.

At oral argument the attorney for the county asserted that under the County’s Order, the Measure 37 relief granted to the “present owner” claimant would “run with the land” and would be “transferable to subsequent owners of the property.” There is no support for this position of the County in the language of Measure 37.

In this case, the Court is not required to examine the history of Measure 37 because the County has not presented a “plausible” alternative interpretation of the text of Measure 37 supporting its position on transferability. The interpretation urged by the County would require the Court both to ignore included text (including the definition of “owner”) and to add words that are not part of the text (including the County’s proposed definition of “property”).

Even if the Court were required to consider the history of Measure 37, that history does not support the County’s position. The history of a ballot initiative consists of the “sources of information that were available to the voters at the time the measure was adopted and that disclose the public’s understanding of the measure. Such information

includes the ballot title and arguments for and against the measure included in the voters' pamphlet, and contemporaneous news reports and editorial comment on the measure." *Ecumenical Ministries*, 318 Or. at 559 n.8. There is no discussion or even mention in the voters' pamphlet for the 2004 election of the concept of transferability of Measure 37 claims or rights of subsequent owners, nor do the news reports alluded to in the State's court filings include any such mention or discussion. Under any legal analysis it is clear the voters did not intend Measure 37 claims to be transferable.

County legislation must be consistent with the state statute. *Marquam Farms Corp. v. Multnomah County*, 147 Or. App. 368, 380, 936 P.2d 990 (1997). Measure 37 claims are not transferable. Because Section 1 of Jackson County Order No. 300-05 states Measure 37 claims are transferable, that section is invalid.

STATE INVOLVEMENT IN MEASURE 37 CLAIMS

Section 2 of Order No. 300-05 directs county employees to issue permits without regard to compliance with or waiver from applicable state statutes.

The State's position on this issue also is contrary to the position of Jackson County reflected in Order No. 300-05. The general statement of the State's position is found in a letter from the Department of Land Conservation and Development to the Jackson County Board of Commissioners dated August 10, 2006, of record in this case as Exhibit 4 to the Georges Affidavit ("LCDC Letter"): "Although the county may 'waive' laws they enact under Measure 37, they have no authority to 'waive' laws another government entity enacts, including state laws... . The failure of the owners of the property to obtain an order from the state waiving applicable state laws means that [the

owners' proposed use] is unlawful, as the County is not authorized to approve the [proposed use] when doing so would violate state laws that are still in effect.” (LCDC Letter p. 1; Stipulated Fact No. 11). A specific instance of State involvement also is described in Stipulated Fact No. 11: for “measure 37 claims based upon property acquisition dates that fall between the adoption of statewide land use planning goals and the acknowledgment by LCDC, the use of real property is subject to both state land use regulations and local land use regulations, and a waiver under Measure 37 from both levels of government is necessary before an owner can use the property.”

On its face, Section 2 of the Order purports to direct county employees to grant permits without consideration of, or regard for, state law. The Oregon Supreme Court and the Court of Appeals both have made it clear counties must consider applicable state laws when deciding whether to issue land use-related permits, even after the county's comprehensive plans have been acknowledged and accepted by the State. *Smith v. Clackamas County*, 313 Or. 519, 524, 524n5 (1992) (“sittings of nonfarm dwellings in EFU zones ... remain subject to certain statutes,” e.g. ORS 215.263(3) & (4), even after the county's “comprehensive and implementing ordinances have been acknowledged”); *Foland v. Jackson County*, 311 Or. 167, 180 n10 (1991) (“[t]he local government's decision must, of course, also comply with any relevant statutes”); *Forster v. Polk County*, 115 Or. App. 475, 478 (1992) (both applicable state statutes and county ordinances and rules “must be interpreted and applied by the county in making its decision” whether to permit construction of a dwelling in an EFU zone”); *Kenagy v. Benton County*, 115 Or. App. 131, 136, 136 n3 (1992) (“relevant state statutes remain applicable to local land use decisions after acknowledgment,” i.e., post-acknowledgment “the statutes are also applicable and the [county's]

decisions must satisfy any statutory requirements that are not embodied in the local law”); *Marquam Farms Corp. v. Multnomah County*, 147 Or. App. 368, 380 (1997) (“relevant state statutes retain their independent applicability to local land use decisions after the local legislation has been acknowledged,” in that case, increasing the size of a dog facility on EFU-zoned land).³

It is not enough for the County to include a notation in permits granted to successful Measure 37 claimants to the effect that the State may disagree about whether a state-law waiver also is required. The County does not have the authority to sanction a wholesale disregard for compliance with state statutes that also may govern a particular claimant’s application for building permits. Order No. 300-05 sweeps far too broadly.

The County also argues a property owner “may” wish to apply for a state waiver or “may choose not to make such application.” This argument misses the point. The Order *directs* county employees to issue permits without regard to possible state requirements and it is that mandatory disregard for whether state waivers also are required that renders the Order invalid. If there are cases in which no state waivers are required, the permit can be issued. But it is not for the County to declare in advance that permits “shall” be issued without even an inquiry about whether state requirements also continue to apply.

CONCLUSION

³ To the extent Section 2 of the County’s Order deals with the period of time from the date the Land Conservation and Development Commission adopted statewide land use goals and administrative rules (January 25, 1975) and the date Jackson County’s comprehensive plan and zoning ordinance was adopted in 1983, the Order directs employees to disregard state law. During that interim period of time State approval was required before the issuance of permits by the County.

For the reasons stated in this Opinion, Sections 1 and 2 of Jackson County Order No. 300-05 are invalid. The Court will enter judgment reflecting the Court's determination and declaring Sections 1 and 2 to be unenforceable and void. The attorney for the State of Oregon shall prepare the judgment, consistent with this opinion.

SO ORDERED.

DATED: January 19, 2007.

G. Philip Arnold, Circuit Judge

cc: David J. Hunnicutt
Katherine Greene Georges

EXHIBIT 1

Measure 37

The following provisions are added to and made a part of ORS chapter 197:

(1) If a public entity enacts or enforces a new land use regulation or enforces a land use regulation enacted prior to the effective date of this amendment that restricts the use of private real property or any interest therein and has the effect of reducing the fair market value of the property, or any interest therein, then the owner of the property shall be paid just compensation.

(2) Just compensation shall be equal to the reduction in the fair market value of the affected property interest resulting from enactment or enforcement of the land use regulation as of the date the owner makes written demand for compensation under this act.

(3) Subsection (1) of this act shall not apply to land use regulations:

(A) Restricting or prohibiting activities commonly and historically recognized as public nuisances under common law. This subsection shall be construed narrowly in favor of a finding of compensation under this act;

(B) Restricting or prohibiting activities for the protection of public health and safety, such as fire and building codes, health and sanitation regulations, solid or hazardous waste regulations, and pollution control regulations;

(C) To the extent the land use regulation is required to comply with federal law;

(D) Restricting or prohibiting the use of a property for the purpose of selling pornography or performing nude dancing. Nothing in this subsection, however, is intended to affect or alter rights provided by the Oregon or United States Constitutions; or

(E) Enacted prior to the date of acquisition of the property by the owner or a family member of the owner who owned the subject property prior to acquisition or inheritance by the owner, whichever occurred first.

(4) Just compensation under subsection (1) of this act shall be due the owner of the property if the land use regulation continues to be enforced against the property 180 days after the owner of the property makes written demand for compensation under this section to the public entity enacting or enforcing the land use regulation.

(5) For claims arising from land use regulations enacted prior to the effective date of this act, written demand for compensation under subsection (4) shall be made within two years of the effective date of this act, or the date the public entity applies the land use regulation as an approval criteria to an application submitted by the owner of the property, whichever is later. For claims arising from land use regulations enacted after the effective date of this act, written demand for compensation under subsection (4) shall be made within two years of the enactment of the land use regulation, or the date the owner of the property submits a land use application in which the land use regulation is an approval criteria, whichever is later.

(6) If a land use regulation continues to apply to the subject property more than 180 days after the present owner of the property has made written demand for compensation under this act, the present owner of the property, or any interest therein, shall have a cause of action for compensation under this act in the circuit court in which the real property is located, and the present owner of the real property shall be entitled to reasonable attorney fees, expenses, costs, and other disbursements reasonably incurred to collect the compensation.

(7) A metropolitan service district, city, or county, or state agency may adopt or apply procedures for the processing of claims under this act, but in no event shall these procedures act as a prerequisite to the filing of a compensation claim under subsection (6) of this act, nor shall the failure of an owner of property to file an application for a land use permit with the local government serve as grounds for dismissal, abatement, or delay of a compensation claim under subsection (6) of this act.

(8) Notwithstanding any other state statute or the availability of funds under subsection (10) of this act, in lieu of payment of just compensation under this act, the governing body responsible for enacting the land use regulation may modify, remove, or not to apply the land use regulation or land use regulations to allow the owner to use the property for a use permitted at the time the owner acquired the property.

(9) A decision by a governing body under this act shall not be considered a land use decision as defined in ORS 197.015(10).

(10) Claims made under this section shall be paid from funds, if any, specifically allocated by the legislature, city, county, or metropolitan service district for payment of claims under this act. Notwithstanding the availability of funds under this subsection, a metropolitan service district, city, county, or state agency shall have discretion to use available funds to pay claims or to modify, remove, or not apply a land use regulation or land use regulations pursuant to subsection (6) of this act. If a claim has not been paid within two years from the date on which it accrues, the owner shall be allowed to use the property as permitted at the time the owner acquired the property.

(11) Definitions - for purposes of this section:

(A) "Family member" shall include the wife, husband, son, daughter, mother, father, brother, brother-in-law, sister, sister-in-law, son-in-law, daughter-in-law, mother-in-law, father-in-law, aunt, uncle, niece, nephew, stepparent, stepchild, grandparent, or grandchild of the owner of the property, an estate of any of the foregoing family members, or a legal entity owned by any one or combination of these family members or the owner of the property.

(B) "Land use regulation" shall include:

(i) Any statute regulating the use of land or any interest therein;

(ii) Administrative rules and goals of the Land Conservation and Development Commission;

(iii) Local government comprehensive plans, zoning ordinances, land division ordinances, and transportation ordinances;

(iv) Metropolitan service district regional framework plans, functional plans, planning goals and objectives; and

(v) Statutes and administrative rules regulating farming and forest practices.

(C) "Owner" is the present owner of the property, or any interest therein.

(D) "Public entity" shall include the state, a metropolitan service district, a city, or a county.

(12) The remedy created by this act is in addition to any other remedy under the Oregon or United States Constitutions, and is not intended to modify or replace any other remedy.

(13) If any portion or portions of this act are declared invalid by a court of competent jurisdiction, the remaining portions of this act shall remain in full force and effect.

BEFORE THE BOARD OF COUNTY COMMISSIONERS
STATE OF OREGON, COUNTY OF JACKSON

IN THE MATTER OF INSTRUCTING)
COUNTY EMPLOYEES ON HOW TO)
PROCEED WITH ISSUING PERMITS TO)
SUBSEQUENT OWNERS OF LAND THAT)
WAS SUBJECT TO A CLAIM UNDER)
MEASURE 37, ON HOW TO PROCEED)
WITH ISSUING PERMITS INVOLVING)
LAND THAT WAS GRANTED RELIEF BY)
JACKSON COUNTY BUT NOT THE)
STATE OF OREGON UNDER MEASURE)
37, AND INSTRUCTING COUNTY)
COUNSEL TO INITIATE LITIGATION)
REGARDING SUCH MATTERS)

ORDER No. 300-05

WHEREAS, enactment of Senate Bill 100 in 1973, and the statutes, statewide planning goals, administrative rules and case law that have resulted from enactment of Senate Bill 100, created a system of land use regulation that: (i) is unfair, and denies property owners certain fundamental civil rights with regard to the use and enjoyment of their property, (ii) is enormously complex, and incomprehensible to most persons (including most lawyers), (iii) is nonresponsive to the circumstances and needs of local areas outside of the Willamette Valley, and (iv) contributes to Oregon's economic and unemployment problems through overly restrictive regulation of land uses; and

WHEREAS, Ballot Measure 37 amended Chapter 197 of the Oregon Revised Statutes by initiative vote of the People of Oregon at the November 2, 2004 general election; and

WHEREAS, an overwhelming majority of persons (62%) who voted in Jackson County voted to adopt Measure 37; and

WHEREAS, Measure 37 was intended to partially remedy the problems, shortcomings and inequities of Oregon's system of land use regulation; and

WHEREAS, Measure 37 is a civil rights statute designed and intended to return to the people a portion of their fundamental civil rights that were lost by enactment of Senate Bill 100 (1973), and the statutes, statewide planning goals, administrative rules and case law that have resulted from enactment of Senate Bill 100 (1973); and

WHEREAS, Measure 37 is a statute designed and intended to simplify the land use regulations that apply to real property by allowing local governments to decide to remove, modify or not apply newly enacted land use regulations (with limited exceptions), and by excluding any such decisions from the jurisdiction of the Land Use Board of Appeals (LUBA); and

WHEREAS, Measure 37 returns some land use decision-making authority to local governments, where it properly belongs and where local circumstances and needs can be considered, that was lost by enactment of Senate Bill 100 (1973); and

WHEREAS, Measure 37 is a mechanism for developing real property that under Senate Bill 100 and subsequent land use regulations could not otherwise be productively used, thereby promoting and enhancing stewardship of land and natural resources and creating new employment opportunities and economic growth; and

WHEREAS, Jackson County has enacted an ordinance to implement Measure 37 in a manner that is intended to be conducive to the rights of private property owners; and

WHEREAS, Jackson County has received in excess of 125 claims under Measure 37, and to date has processed and decided approximately 25 percent of those claims; and

WHEREAS, an overwhelming majority of the claims submitted to Jackson County under Measure 37 have been determined by the Board of Commissioners to be valid claims, and with respect to each claim that has been determined to be valid the Board of Commissioners has elected to "not apply" certain Jackson County land use regulations, rather than to pay compensation to the claimant; and

WHEREAS, in the course of implementing Measure 37, several issues of statewide importance have come to light, which have created uncertainty as to the proper interpretation of Measure 37 and have resulted in unacceptable risks for property owners filing Measure 37 claims, local governments processing and deciding Measure 37 claims, purchasers of property that was the subject of a valid Measure 37 claim, title insurance companies, lenders that rely upon real property as collateral for loans, and other interested persons and entities; and

WHEREAS, local governments throughout Oregon, including Jackson County, have strongly encouraged the Governor and the Legislative Assembly to address the issues creating uncertainty with regard to Measure 37, particularly since: (i) Measure 37 concerns fundamental civil rights, (ii) Measure 37 was enacted through the initiative process, with overwhelming support in every area of the State of Oregon, and (iii) the uncertainty surrounding Measure 37 is being created by the irresponsible actions of agencies within the State of Oregon itself, most notably the Department of Justice and the Department of Land Conservation and Development, that seek to undermine the clear intent of the voters; and

WHEREAS, the Governor and the Legislative Assembly have failed to discharge their obligations to the people of the State of Oregon by refusing to address the issues creating uncertainty with regard to Measure 37; and

WHEREAS, the absence of leadership on the part of both the Governor and the Legislative Assembly in addressing Measure 37 issues means that solutions must be derived by local governments proceeding in the face of uncertainty, and by the courts which must hear and decide any legal challenges that are initiated; and

WHEREAS, Jackson County has continually taken a leadership role in implementing Measure 37 in a manner that respects the will of the voters and that restores the civil rights of property owners, and is willing to continue to act as a leader in contrast to the inaction of the Governor and Legislative Assembly and the attempts to undermine the clear intent of Measure 37 by State bureaucrats within the Department of Justice and the Department of Land Conservation and Development; and

WHEREAS, Jackson County has identified two specific issues concerning Measure 37 that are in need of most immediate attention and resolution: (i) Whether relief granted to a current owner of real property under Measure 37, in the form of a decision to modify, remove or not apply land use regulations, can be transferred to a subsequent owner of the property, and (ii) Whether a property owner ever needs to

file a Measure 37 claim with the State of Oregon, and obtain relief in the form of a decision to modify, remove or not apply state land use regulations, in addition to filing a claim with the appropriate local government, before a use may be made of the property that was permitted at the time that the current owner acquired the property; and

WHEREAS, with respect to the first issue identified above, the Oregon Department of Justice, in a letter of advice dated February 24, 2005 and addressed to Lane Shetterly of the Department of Land Conservation and Development, advised that "the relief [provided under Measure 37] is personal to the current owner of the property," and that if "the current owner of the property conveys the property before the new use allowed by the public entity is established, then the entitlement to relief will be lost"; and

WHEREAS, with respect to the second issue identified above, the Department of Land Conservation and Development, in a letter dated May 2, 2005 and addressed to "Local Government Partner[s]," indicated that with regard to Measure 37 claims based upon property acquisition dates that fall between the adoption of statewide land use planning goals and the acknowledgment by the Land Conservation and Development Commission, the use of real property was subject to both state land use regulations and local land use regulations, and a waiver under Measure 37 from both levels of government is necessary before an owner can use the property for a use that was permitted at the time the property was acquired; and

WHEREAS, in an effort to alert Measure 37 claimants and others and to enable such persons to take whatever action they deem appropriate to protect their interests in property, the above-referenced letters are quoted in the Orders of the Board of Commissioners approving Measure 37 claims, and copies of the letters are included as exhibits to the Orders; and

WHEREAS, a majority of the Board of Commissioners of Jackson County disagrees with the conclusions expressed in the two letters referenced above, and believes that the conclusions ignore the clear intent of the voters and misstate the law; and

WHEREAS, potential purchasers of real property located in Jackson County that has been granted relief under Measure 37 by the Board of Commissioners are currently inquiring of county staff as to whether the relief granted by the Board of Commissioners is transferable to them if they acquire ownership of the property; and

WHEREAS, owners of property located in Jackson County that has been granted relief under Measure 37 by the Board of Commissioners are currently seeking to obtain appropriate permits to begin development of their property without submitting a claim or obtaining relief under Measure 37 from the State of Oregon; and

WHEREAS, Jackson County is not permitted to indefinitely withhold issuing building permits and other permits on properties granted relief under Measure 37, and therefore is not in a position to wait until the Governor and/or Legislative Assembly decide to resolve issues of uncertainty surrounding Measure 37, and therefore Jackson County must act immediately.

NOW THEREFORE, the Board of County Commissioners of Jackson County hereby ORDERS that:


1. All relief granted by the Jackson County Board of Commissioners under Measure 37 shall be transferable to subsequent owners of the property. To protect the interests of claimants and subsequent

owners of the property, Orders of the Board of Commissioners granting relief under Measure 37, and all permits issued pursuant to such Orders, shall continue to advise of the position on this issue taken by the Department of Justice. County employees shall issue such permits to subsequent owners of property that was granted relief under Measure 37.

2. County employees shall issue such permits as were authorized to owners of property that was the subject of an Order of the Board of Commissioners granting relief under Measure 37, notwithstanding the failure of such owners or any previous or subsequent owners, to file a claim with the State of Oregon or to obtain relief from the State of Oregon under Measure 37. To protect the interests of owners and previous and subsequent owners of the property, the Orders of the Board of Commissioners, and all permits issued pursuant to such Orders, shall advise of the position taken on this issue by the Department of Land Conservation and Development.

3. County Counsel shall initiate litigation to obtain a final judgment from the Circuit Court with respect to issuing permits to subsequent owners of property that was granted relief under Measure 37, and with respect to issuing permits to owners of property that was granted relief under Measure 37 that have not sought and/or obtained relief from the State of Oregon under Measure 37. The form of the litigation shall be a declaratory judgment action, judicial validation proceeding under ORS 33.710 *et seq.*, or any other action or proceeding in law or equity that County Counsel determines to be appropriate. County Counsel is hereby authorized to name the State of Oregon, the Land Conservation and Development Commission and/or any individual LCDC Commissioner, the Department of Land Conservation and Development and/or Lane Shetterly, and any other State agency or officer as a defendant or respondent to any action or proceeding, as well as an appropriate property owner, purchaser of property, or potential purchase of property, that was subject to relief granted under Measure 37. County Counsel is further authorized to undertake any and all necessary acts to further advance Jackson County's legal interests in the action or proceeding.

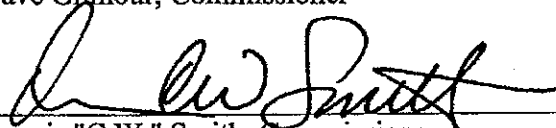
DATED this 7th day of July, 2005 at Medford, Oregon.



Jack Walker, Chair

 voted No

Dave Gilmour, Commissioner




Dennis "C.W." Smith, Commissioner

CERTIFICATE OF FILING

1 I hereby certify that on January 24, 2007, I filed the original of this OREGON
2 DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT'S PETITION FOR
3 REVIEW, together with four copies, with the Land Use Board of Appeals, 550 Capitol Street
4 N.E., Suite 235, Salem, OR 97301-2552, by first-class mail.

5 DATED this 24th day of January 2007.

6 
7 Richard M. Whitman, #89382
8 Attorney-in-Charge
9 Steven E. Shipsey, #94435
Assistant Attorney General
Of Attorneys for Petitioner

10 CERTIFICATE OF SERVICE

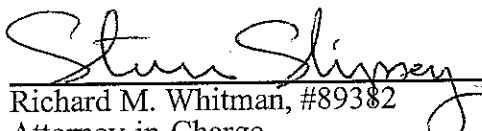
11 I certify that on January 24, 2007, I served a true and correct copy of this on the
12 following parties by first-class mail:

13 Douglas M. McGeary
14 Jackson County Counsel
15 10 South Oakdale, Room 118A
Medford, OR 97501

16 Lane Shetterly, Director
17 Department of Land Conservation and Development
18 635 Capitol Street N.E., Suite 150
Salem, OR 97301

19 Jeannine Rustad
20 Department of Land Conservation and Development
21 635 Capitol Street N.E., Suite 150
Salem, OR 97301

22 DATED this 24th day of January 2007.

23 
24 Richard M. Whitman, #89382
25 Attorney-in-Charge
26 Steven E. Shipsey, #94435
Assistant Attorney General
Of Attorneys for Petitioner